IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 170 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SYNBIOTICSLTD

Versus

COMMISSIONER OF INCOME TAX, BARODA.

Appearance:

MR RK PATEL for applicant.

MR BB NAIK for Respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE K.A.PUJ

Date of decision: 06/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The Income Tax Appellate Tribunal, Ahmedabad Bench "A", Ahmedabad, has referred the following questions for the opinion of this Court :

1. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount of Rs. 50,345 paid as guarantee commission was on capital account and disallowable as such ?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that an amount of Rs. 20,924/= in respect of exchange loss was disallowable as capital expenditure ?

3. Whether the Tribunal was justified in law in confirming the levy of interest u/s. 215 of the Act ?"

2. The Revenue has also preferred Reference Application against the order of the Income Tax Appellate Tribunal and at the instance of the Revenue, following question was referred to this Court for our opinion;

"Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that charging of interest u/s. 216 of the I.T. Act, 1961, was not justified ?"

3. As for as Question No.1 is concerned, the Tribunal, vide its order dated 3-3-1986 has confirmed the disallowance of guarantee commission of Rs. 50,345/=. While confirming the said disallowance, the Tribunal has followed the decision of this Court in the case of C.I.T. Vs. Vallabh Glass Works Ltd (1982) 137 ITR 389. At the time of hearing of this Reference it was pointed out by the learned counsel appearing for the assessee that a similar question arose before this Court in the case of Ambica Mills Ltd. Vs. Commissioner of Income Tax, reported in (1999) 235 ITR 265, wherein following the Supreme Court decision in the case of Additional C.I.T. Vs. Akkamamba Textile Mills Ltd (1997) 227 ITR 464, which was reiterated in the case of C.I.T. Vs. Sivakami Mills Ltd., reported in (1997) 227 ITR 465, this Court has taken the view that guarantee commission paid in such

cases was a revenue expenditure. In view of the pronouncement of the Supreme Court in the abovereferred cases as well as having regard to the view taken by this Court in the latter decision of Ambica Mills Ltd., (Supra), the reliance placed by the Tribunal on the decision of CIT Vs. Vallabh Glass Works Ltd. (Supra) is not held to be justified. We, therefore, reverse the decision of the Tribunal on this point and hold that the expenditure of Rs. 50,345/= incurred on account of guarantee commission is revenue expenditure. We, accordingly, answer the Question No.1 in negative, in favour of the assessee and against the Revenue.

4. As for as the Question No.2 is concerned, the Tribunal has relied on the decision in assessee's own case for Assessment Year 1977-78 and disallowed the claim of the assessee to the extent of Rs. 26,924/= in respect of exchange loss. This issue is squarely covered by the decision of the Supreme Court in the case of Commissioner of Income Tax Vs. Tata Iron & Steel Co. Ltd., reported in (1998) 231 ITR 285, wherein it is held that at the time of repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which, the assessee had to repay a much lesser amount than he would have otherwise paid. It was further held that this was not a factor which could alter the cost incurred by the assessee for purchase of the asset. The assessee might have raised the funds to purchase the asset by borrowing but what the assessee had paid for it, was the price of the asset. That price could not change by any event subsequent to the acquisition of the asset. The manner or mode of repayment of the loan had nothing to do with the cost of an asset acquired by the assessee for the purpose of his business. Following this decision, we hold that the assessee is not entitled to claim the exchange loss of Rs. 26,924/= as revenue expenditure. Accordingly, the Question No.2 is answered in the affirmative, in favour of the Revenue and against the assessee.

5. So far as the Question No.3 is concerned, following the decision taken by this Court in I.T.R. No. 75 of 1987, rendered today, we hold that the interest u/s. 215 of the Act was rightly charged by the Income Tax Officer and that the Tribunal was justified in confirming levy of interest under Section 215 of the Act. We, accordingly, answer this question in affirmative in favour of the Revenue and against the assessee.

6. This brings us to the question referred at the instance of the Revenue. The issue is with regard to the

chargeability of interest under Section 216 of the Act. The Income Tax Officer had not given any reason whatsoever for levy of interest under Section 216 of the Act, nor he had recorded the requisite finding as contemplated by Clause (a) of Section 216 of the Act. The similar issue came up before this Court in Shree Digvijay Woollen Mills Ltd. Vs. Commissioner of Income Tax, reported in (1993) 204 ITR 398, wherein, after considering the relevant case law on the subject, this Court has held;

> "That, so far as the facts of this case were concerned, it was not in dispute that the Income-tax Officer not only did not give any reasons for levying interest under section 216 but had also not recorded the requisite finding contemplated by clause (a) of section 216. The assessee did make a grievance before the Appellate Assistant Commissioner in this behalf. The Appellate Assistant Commissioner held that the interest was correctly chargeable. The prayer for setting aside the order of the Income-tax Officer was very much implicit in the grievance made by the assessee before the Appellate Assistant Commissioner. The Tribunal was not right in holding that the Income-tax Officer was justified in giving a direction to the assessee to pay interest under section 216. The Tribunal ought to have set aside the order of the Income-tax Officer as confirmed by the Appellate Assistant Commissioner and ought to have remanded the matter to the Income-tax Officer for passing a fresh order as contemplated by section 216."

We accordingly hold that the Tribunal ought to have set aside the order of the Income-tax Officer, as confirmed by the Commissioner, and ought to have remanded the matter to the Income Tax Officer for passing a fresh order as contemplated by Section 216 of the Act. For this reason, we answer this question in the negative, that is, in favour of the assessee and against the Revenue.

7. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

rmr. [R.K. Abichandani, J.]

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[K.A. Puj, J.]